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Land and Natural Resources Survey

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LAND AND NATURAL RESOURCES SURVEY

INTRODUCTION

This Survey focuses on recent cases affecting oil and gas and public lands. Part I demonstrates how contractual agreements govern relationships in the oil and gas arena. This section explores how courts may either take an active role in interpreting such agreements by ignoring the express language to reach an equitable result, or the courts may allow the contracting parties to allocate risk and define the nature of the agreement. In *Amoco Rocmount Co. v. Anschutz Corp.*,[1] the United States Court of Appeals for the Tenth Circuit unconvincingly determined that a gas market sharing provision in a unit operating agreement was ambiguous, thereby enabling the court to equitably distribute proceeds from the sale of production. In *Reese Exploration, Inc. v. Williams Natural Gas Co.*,[2] the Tenth Circuit relied on the language in the assignment agreements to determine whether a gas owner was negligent for damage caused by escaping gas. In *Reese*, the court allowed the oil and gas parties entering a contractual agreement to define their relationship, while in *Amoco* the court took an active role in establishing the parties' relationship.

Part II focuses on public lands. This section discusses public participation in Bureau of Land Management (BLM) planning pursuant to the Federal Land Policy and Management Act of 1976.[3] In *National Parks & Conservation Ass'n v. Federal Aviation Administration*,[4] the Tenth Circuit correctly held that the Bureau of Land Management failed to meet its statutory obligation of providing adequate public notice prior to conveying lands that had been previously designated by the BLM as Areas of Critical Environmental Concern. Although the court sent a powerful message to the BLM regarding the necessity of public participation, its ruling had little effect on the situation at hand because the court had previously ignored a request for an injunction preventing the conveyance.

I. OIL AND GAS

A. *Interpreting "Ambiguous" Agreements to Equitably Balance Gas Proceeds:* Amoco Rocmount Co. v. Anschutz Corp.[5]

1. Background

In oil and gas production, unitization refers to combining leases and wells in order to maintain pressure or to aid secondary or tertiary recovery

1. 7 F.3d 909 (10th Cir. 1993), *cert. denied*, 114 S. Ct. 1507 (1994).
2. 983 F.2d 1514 (10th Cir. 1993).
3. 43 U.S.C. §§ 1701-1784 (1988).
4. 998 F.2d 1523 (10th Cir. 1993).
5. 7 F.3d 909 (10th Cir. 1993).

operations.[6] The unitized development of reservoirs has been advocated since the early 1900's.[7] Prior to unitization, production attempts centered around maximizing the amount of drilling occurring within a given field.[8] However, dissipation of the natural pressure in reservoirs caused by overdrilling left large amounts of oil in the formation.[9] The concepts of communitization, pooling, and unitization arose, in part, to remedy this problem.[10] Although the effect of these concepts is similar,[11] unitization is "the most satisfactory cooperative plan from the standpoint of maximizing a yield from an entire producing formation."[12]

A plan of unitization is generally effectuated by two separate instruments: the unit agreement and the unit operating agreement.[13] A unit agreement is defined as an agreement "of development and operation for the recovery of oil and gas . . . as a single consolidated unit without regard to separate ownerships and for the allocation of costs and benefits on a basis as defined in the agreement or plan."[14] More specifically, the unit agreement defines the areal limits, creates the unit, designates the unit operator, and determines the participation formula to distribute produc-

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6. JOHN S. LOWE, OIL AND GAS LAW, 220-21 (1983). Secondary recovery is a method of recovery in which extraneous energy sources, such as liquids or gas, are employed to move the hydrocarbons through the reservoir or to extract the product. HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS TERMS 798 (6th ed. 1984) [*hereinafter* TERMS].

Tertiary recovery is an enhanced method of recovery of crude oil or natural gas in which chemicals or energy are employed to assist in the recovery process. *Id.* at 900.

7. Bruce M. Kramer, "Unit Agreements - Historical Perspective and Theoretical Underpinnings," *Federal Onshore Oil and Gas Pooling and Unitization II*, Paper No. 4, 4-2 (Rocky Mtn. Min. L. Fdn. 1990).

8. *See* Philip G. Dufford, "Summary of Comments Relative to an Introduction to Pooling and Unitization," *Institute on Pooling and Unitization of Oil and Gas Interests*, Paper No. 1, 1-7 to 1-8 (Rocky Mtn. Min. L. Fdn. 1980). The desire to maximize production and its subsequent negative effects were largely caused by the early adoption of the rule of capture. *See* 1 BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION § 2.02 (3d ed. 1992). The rule of capture created substantial problems for efficient development of oil and gas. Kramer, *supra* note 7, at 4-3. *See also infra* part II.

9. Dufford, *supra* note 8, at 1-8. *See also* KRAMER & MARTIN, *supra* note 8, § 2.03 ("the amount of hydrocarbons that are left underground as the result of primary production techniques may be substantial").

10. Dufford, *supra* note 8, at 1-9 to 1-10. Communitization, or the communitized lease, allows owners of small tracts of land to execute a common lease with the understanding that a well drilled anywhere within the area will benefit all the owners proportionally to the amount of land contributed. *See id.* Pooling also refers to the combining of ownerships, but applies to lessees as well as lessors. *Id.* at 1-10. Pooling developed to maximize the spacing of wells to most efficiently drain an area. *Id. Cf.* TERMS, *supra* note 6, at 140, 652 (indicating that communitization and pooling are synonyms). The terms unitization and pooling are used synonymously. LOWE, *supra* note 6, at 220.

11. *Compare* Kramer, *supra* note 7, at 4-6 to 4-7 (*unitization* eliminates the internal property lines within the unit area so that the wells can be drilled where they most effectively drain the reservoir) *with* Dufford, *supra* note 8, at 1-10 (*pooling* maximizes the spacing of wells to most effectively drain a given area).

12. Dufford, *supra* note 8, at 1-10. There are two primary types of unitized operations: developmental and operational. Kramer, *supra* note 7, at 4-2. The developmental unit is formed to permit rapid and systematic field development. TERMS, *supra* note 6, at 218. The operational unit deals with a mature field or reservoir, typically created in order to implement secondary or tertiary recovery. Kramer, *supra* note 7, at 4-2.

13. Kramer, *supra* note 7, at 4-1.

14. TERMS, *supra* note 6, at 936.

tion.[15] The unit agreement typically includes all interest owners: mineral, leasehold, and royalty.[16]

Although some of its functions overlap, the unit operating agreement is generally more limited in its focus than the unit agreement in that it defines the relationships among the working interest owners. In other words, a unit operating agreement is concerned with the "parties sharing the costs of unit development, typically the leasehold and unleased mineral owners."[17] The unit operating agreement also governs the allocations of funds derived from the sale of the production.[18]

Although standard forms of these agreements are available,[19] every unitization is unique. Therefore, the parties must exercise "substantial care . . . in the drafting of provisions appropriate for the particular situation."[20] Unit agreements and unit operating agreements are exceedingly complex because of the high possibility of unforeseeable future conflicts.[21] The parties must adequately address various issues in the agreement to avoid future problems, including:[22] the allocation of production among the premises included in the unit;[23] the allocation of drilling and other costs;[24] payment of shut-in royalties to lessors;[25] problems arising from the creation of units applicable only to specified minerals or strata;[26]

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15. Kramer, *supra* note 7, at 4-1.

16. *Id.*

17. *Id.* Although an instrument may be termed an "operating agreement," it may not be limited to controlling the actual operation of producing wells. The agreement may encompass the exploration and exploitation as well as the production and abandonment phases. Thomas P. Schroedter & Lewis G. Mosburg, Jr., "An Introduction to the AAPL Model Form Operating Agreement," *The Oil and Gas Joint Operating Agreement*, Paper No. 1, 1-1 (Rocky Mtn. Min. L. Fdn. 1990).

18. Amoco Rocmount Co. v. Anschutz Corp., No. C86-0172-B, at 2 (D. Wyo. July 30, 1990) (findings of fact and conclusions of law).

19. For a sample unit agreement, see 7 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 920.1-2 (1993). For a sample unit operating agreement, see *Federal Onshore Oil and Gas Pooling and Unitization II*, 195-a (Rocky Mtn. Min. L. Fdn. 1990); 3 KRAMER & MARTIN, *supra* note 8, § 29.02.

See also Joe O. Young, "Non-Federal Operating Agreements," *Institute on Pooling and Unitization of Oil and Gas Interests*, Paper No. 9, 9-1 to 9-4 (Rocky Mtn. Min. L. Fdn. 1980) (describing the intended and preferred uses for various forms of unit operating agreements, mining joint operating agreements, and offshore operating agreements).

20. 6 WILLIAMS & MEYERS, *supra* note 19, § 920. *See also id.* at §§ 921 - 921.19 (discussing customary provisions of pooling and unitization agreements).

21. The risk of potential conflicts is reduced by the fact that the parties generally engage in protracted negotiations in creating unitization agreements. *See id.* § 924 (describing the various stages occurring in agreement negotiations).

22. It is beyond the scope of this article to discuss all of the issues and problems that should be addressed in unit and unit operating agreements. Agreement negotiations may take years. *Id. See also* Young, *supra* note 19, at 9-7 to 9-13 (discussing problems either created or not resolved by the A.A.P.L. form 610-Model Form Operating Agreement).

23. 6 WILLIAMS & MEYERS, *supra* note 19, § 970.

24. *Id.* § 972.

25. *See id.* § 982. A shut-in royalty clause in an oil and gas lease allows the lessee to make payments to the lessor to keep the lease alive when a well has been drilled which is capable of producing "in paying quantities," but the gas is not being marketed. *See* TERMS, *supra* note 6, at 818.

26. 6 Williams & Meyers, *supra* note 19, §§ 973 - 974.4.

description problems;[27] alteration in unit boundaries;[28] and the fiduciary duties of the unit operator and other parties.[29]

In addition, parties to a unit operating agreement may attempt to predict future gas balancing[30] problems or inequities in gas sales by including a gas balancing agreement or other provisions within the unit operating agreement that address possible future gas inequities.[31] The inclusion of such provisions make the unit operating agreement (and the task of negotiating it) much more complex.[32] Generally, gas balancing problems arise when working interest owners fail to take gas in proportion to their ownership interest, thereby leaving parties either over or underproduced.[33] Gas balancing problems may also arise when one party enters a gas sales contract and the other parties do not.[34]

The reasons for disproportionate gas production or sales are as numerous as the situations in which they occur.[35] The methods by which parties choose to balance also vary greatly.[36] Therefore, provisions ad-

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27. *Id.* § 980.3.

28. *Id.* § 980.2.

29. *Id.* § 991.

30. Gas balancing is "[t]he process by which persons having an interest in production from a well, unit or reservoir adjust their take therefrom to ensure that each such person receives his proportionate part of production." TERMS, *supra* note 6, at 62.

31. *See* Ernest E. Smith, "Relationships Between Co-Owners in Marketing Natural Gas," *Institute on Natural Gas Marketing*, Paper No. 11, 11-1 (Rocky Mtn. Min. L. Fdn. 1987) ("The operating agreement may, or may not, contain a gas balancing agreement as an attachment, and either its presence or its absence may create problems of interpretation relative to the producer's right to sell the gas.").

See also Bert L. Campbell, "Gas Balancing Agreements," *Institute on Oil and Gas Agreements*, Paper No. 9, 9-4 (Rocky Mtn. Min. L. Fdn. 1983) (noting that balancing was accomplished for years without written agreements). Working interest owners have elected to proceed without gas balancing agreements due to uncertainty in meaning or result. *Id.* at 9-5.

32. "The difficulty experienced in negotiating balancing agreements is evidenced by the fact that many oil balancing agreements provide that the parties agree to agree on a balancing agreement for gas if and when commercial production of gas is obtained, thus postponing to a later day the complex negotiating process." 8 WILLIAMS & MEYERS, OIL AND GAS TERMS 85 (citing Pogo Producing Co. v. Shell Offshore, Inc., 898 F.2d 1064, 1065 (5th Cir. 1990)).

33. Ezekiel J. Williams, *Land and Natural Resources Survey*, 70 DENV. U. L. REV. 811, 812 (1993). A party is "underproduced" if it does not sell its share of production. *Id.* Conversely, overproduced parties have taken more than their share. *Id.*

34. *See* KRAMER & MARTIN, *supra* note 8, § 19.05. The question then becomes whether the party with the sales contract must account to the other parties for their proportionate share of production. *Id.* This was the question put to the court in *Amoco*. *See infra* part I.B.

35. *See* Campbell, *supra* note 31, at 9-1 to 9-3 (providing extensive examples of situations in which gas balancing disputes may arise).

36. Courts recognize three methods for balancing: (1) *balancing in kind* requires the underproduced party to take a percentage of the overproduced party's gas until the imbalance has been made up; (2) *periodic cash balancing* requires that the underproduced party receive cash from the overproducer, curing the imbalance immediately; (3) *cash balancing upon reservoir depletion* occurs when balancing in kind is unavailable because the reservoir has been depleted; therefore, the overproduced party compensates the underproduced party with cash. Beren v. Harper Oil Co., 546 P.2d 1356, 1359 (Okla. Ct. App. 1975).

Absent an agreement on the method of balancing, courts generally prefer balancing "in kind" to remedy gas balancing problems. *See, e.g., Pogo Producing Co.*, 898 F.2d at 1065-66 (explaining that industry usage and custom require balancing in kind to remedy underproduction); Doheny v. Wexpro Co., 974 F.2d 130, 133-34 (10th Cir. 1992) (holding that unless conditions suggest otherwise, balancing in kind is the preferred remedy to correct gas pro-

dressing gas production or sales inequities in unit operating agreements cannot address all of the issues and resolve all of the conflicts that may arise among co-owners as a result of natural gas production and sales.

2. *Amoco Rocmount Co. v. Anschutz Corp.*

In *Amoco Rocmount Co. v. Anschutz Corp.*,[37] the Tenth Circuit held that an ambiguous gas market sharing provision in a unit operating agreement required a party to the agreement to share with the other working interest owners its proceeds from gas sales and its settlement of a take-or-pay contract dispute with a gas purchaser.

a. *Facts*

The Anschutz Corporation (Anschutz) appealed the district court's judgment[38] ordering it to pay over $29 million to Amoco Rocmount Company (Amoco)[39] and other working interest owners (collectively WIOs),[40] for breaching a unit operating agreement.[41] The controversy underlying the litigation stemmed from the 1979 discovery of a reservoir known as the Anschutz Ranch East Unit (AREU).[42] The WIOs of the AREU negotiated a unit operating agreement (UOA) for the field. The UOA contained the controverted provision regarding future gas sales. Section 5.11 of the UOA, entitled Inability to Market All Gas, read in part:

> If at any time a Party's share of the gas available for sale exceeds the quantity of gas such Party's gas purchaser will take (excess gas), then every other Party, if requested to do so by the Party owning such excess gas, shall be obligated to share its market for gas with the Party owning such excess.[43]

Prior to 1979, Anschutz entered into a long-term, take-or-pay natural gas sales contract[44] with Natural Gas Pipeline Company of America (NGPL), which encompassed the area in which AREU was subsequently

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duction imbalances in the absence of a formal gas balancing agreement); Williams, *supra* note 33, at 816 (discussing the types of balancing available and providing an analysis of the *Doheny* ruling).

37. 7 F.3d 909 (10th Cir. 1993).

38. Amoco Rocmount Co. v. Anschutz Corp., No. C86-0172-B (D. Wyo. July 30, 1990).

39. Amoco also appealed the district court's judgment awarding damages to Anschutz for $4,940,585.03 for indemnifaction of attorney's fees for the Anschutz-NGPL suit and for breaching its duty as unit operator to notify the working interest owners prior to making substantial changes in the basic method of operation. *Amoco Rocmount*, 7 F.3d at 913, 920.

40. A working interest is "[t]he operating interest under an oil and gas lease. The owner of the working interest has the exclusive right to exploit the minerals on the land." TERMS, *supra* note 6, at 979. The WIOs of a unitized area are entitled to pro rata shares in the oil and gas produced from the field. *See Amoco Rocmount*, No. C86-0172-B, at 2 (findings of fact and conclusions of law).

See also LOWE, *supra* note 6, at 388 (a working interest is "[t]he rights to the mineral interest granted by an oil and gas lease, so-called because the lessee acquires the right to work on the leased property to search, develop and produce oil and gas." The right is coupled with an obligation to pay all costs).

41. *Amoco Rocmount*, 7 F.3d at 913.

42. *Id.*

43. *Id.*

44. In a take-or-pay contract, the "purchaser agrees to take a minimum quantity of . . . gas over a specified term at a fixed price . . . or to make minimum periodic payments to the

discovered.[45] Anschutz assigned one-half of its interest in the AREU to Mobil Rocky Mountain, Inc. (Mobil), including a share of the contract with NGPL. In 1985, however, NGPL curtailed its AREU gas purchases and filed suit against Anschutz and Mobil to relieve itself of its obligations under the take-or-pay contract because natural gas prices were plummeting.[46] These disputes were settled out of court.[47]

Amoco and the other WIOs did not enter into long-term gas sales contracts during this period; however, all the WIO's had gas sales contracts, and all but one sold some gas. The gas Anschutz sold to NGPL equaled only its working interest owner's share of gas available for sale.[48]

In 1986, Amoco and the other WIOs (collectively Amoco) sued Anschutz, claiming that according to section 5.11 of the UOA, Anschutz was obligated to share the proceeds of its sales to NGPL.[49] Amoco also claimed that under section 5.11, it was entitled to a share of the settlement money Anschutz received from NGPL for breaching the take-or-pay contract.[50] In addition, because Mobil had purchased an interest in the AREU and part of the NGPL contract from Anschutz, Amoco sued Mobil for the same market sharing benefits from its gas sales to NGPL.[51] Amoco and Mobil settled the dispute. Although Mobil was uncertain about the meaning or application of section 5.11, the amount on which the parties settled was consistent with Amoco's interpretation of the section.[52]

Anschutz argued that section 5.11 was not applicable because Amoco did not have the requisite gas purchaser and did not make the required request. According to Anschutz, section 5.11 provided a method for short-term cash balancing that would take effect only when one party's purchaser was unable to take all of that party's gas.[53]

b. *District Court*

The district court held that section 5.11 required Anschutz to share the proceeds of its natural gas sales with the other WIOs.[54] In reaching its conclusion, the court determined that the term "excess gas" was ambigu-

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producer even though (the) . . . gas is not being delivered to the purchaser." TERMS, *supra* note 6, at 883.

45. *Amoco Rocmount*, 7 F.3d at 914.

46. *Id.* In 1980, the average wellhead gas price in Wyoming and Utah was $1.78 per one thousand cubic feet (mcf). In 1981, it was $2.47 per mcf; $3.19 in 1982; and $3.41 in early 1984. Upon deregulation, the prices fell in 1985. By 1986, prices were down to $2.59 per mcf. *Amoco Rocmount*, No. C86-0172-B at 6.

See also David W. Wilson, "What is Happening to our Natural Gas Markets?" *Natural Gas Marketing*, Paper No. 13 (Rocky Mtn. Min. L. Fdn. 1987) (explaining that the deteriorating natural gas market was caused, in part, by a drop in demand, competition from an overbuilt electrical generating capacity, and a non-responsive regulatory structure).

47. *Amoco Rocmount*, 7 F.3d at 914.

48. *Amoco Rocmount*, No. C86-0172-B at 8-9.

49. Amoco Rocmount v. Anschutz Corp., No. C86-0172-B (D. Wyo. July 30, 1990).

50. *Amoco Rocmount*, 7 F.3d at 914.

51. *Id.* at 919.

52. *Id.* at 920.

53. *Amoco Rocmount*, No. C86-0172-B at 4.

54. *Id.* at 28.

ous.[55] Therefore, the court admitted extrinsic evidence regarding the parties' intent. The evidence included testimony and memoranda from representatives of the WIOs, the parties' post-agreement conduct, and the settlement between Amoco and Mobil.

The court agreed with Anschutz that the section provided for cash balancing, but disagreed when it took effect. The court observed that although in kind balancing is the preferred remedy, equity or special circumstances may compel a court to cash balance.[56] A court must also allow cash balancing if the agreement between the parties provides for cash balancing. The court concluded that "the agreement here, although ambiguous, clearly provides for cash balancing."[57] The court explained that the WIOs rejected in kind balancing because the gas recovery process required nitrogen injection which would decrease the quality of the gas and increase the cost of processing the gas, thus making balancing in kind inequitable.[58]

The court also found that the parties' post-agreement conduct "overwhelmingly" indicated that all parties intended the section to be a market sharing provision without a gas purchaser prerequisite.[59] The specific conduct the court relied on included the following facts: Amoco paid annual royalties and taxes on the revenue it expected from the NGPL sales;[60] a 1985 letter from Anschutz's vice president proposed to make payments to Amoco for distribution among the WIO as "a resolution to the WIO's differences";[61] reports prepared for Anschutz by Scientific Software Corporation prior to 1985 referred to the "gas contract sharing agreement" and thereafter referred to the "gas contract sharing agreement which has now been discontinued";[62] and a complaint Anschutz filed against NGPL that stated that it had obtained an interest in and expected in the future to obtain interests in natural gas not taken from the Unit by the other WIOs.[63] In addition, several of the WIOs were marketing for one another and sharing sales revenues.[64]

Finally, the court held that Anschutz's interpretation was unreasonable. The court could find "no reasonable explanation for why the parties

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55. "Excess gas," the court reasoned, could mean any gas left after a purchaser had taken some or any amount of gas unsold. *Id.* at 10.

56. *Id.* at 21-24. The cases on which the court based its gas balancing discussion included: Pogo Producing Co. v. Shell Offshored, Inc., 898 F.2d 1064 (5th Cir. 1990); Chevron v. Belco Petroleum Corp., 755 F.2d 1151 (5th Cir. 1985); United Petroleum Exploration v. Premier Resources, 511 F. Supp. 127 (W.D. Okla. 1980); Shell Offshore, Inc. v. Marr, No. 89-0846 (E.D. La. Jan. 5, 1990).

57. *Amoco Rocmount*, No. C86-0172-B at 24.

58. *Id.*

59. *Id.* at 25.

60. *Id.* at 26. Amoco's income projections, however, did not mention market sharing revenues. *Id.* at 12.

61. *Id.* at 26. The court assumed that this "proposal could not have been made if Anschutz had not recognized an obligation to share its market under § 5.11." *Id.* at 13.

62. *Id.* at 26. The information used by Scientific Software was provided entirely by Anschutz. *Id.* at 14.

63. *Id.* at 14, 26.

64. *See id.* at 12-13.

would have intended to require a gas purchaser before the market sharing provisions would go into effect."[65]

On appeal, Anschutz argued that the district court incorrectly: 1) determined that 5.11 was ambiguous; 2) held that 5.11 did not require a gas purchaser; and 3) admitted evidence regarding the settlement between Mobil and Amoco.[66]

c. *Tenth Circuit Opinion*

After assuming jurisdiction,[67] the Tenth Circuit upheld the district court's interpretation of section 5.11 requiring Anschutz to share its gas market and settlement proceeds with Amoco and the other WIOs. The Tenth Circuit explained that the district court had correctly found section 5.11 to be ambiguous[68] and that the district court's extensive findings of fact regarding the parties' intent were not clearly erroneous. Therefore, the Tenth Circuit could not overturn the district court's holding regarding the meaning of the section.[69] In addition, the Tenth Circuit held that the trial court's admission of the settlement agreement between Mobil and Amoco was not an abuse of discretion due to the low threshold for relevancy.[70]

3. Analysis

Given the complex nature of gas balancing and unit operating agreements, it is unlikely that parties will foresee and adequately address all potential problems. The parties' failure in *Amoco* to clearly define section 5.11 of the unit operating agreement resulted in a difficult, $29 million

65. *Id.* at 26.

66. *Amoco Rocmount*, 7 F.3d at 917. Anschutz argued in the alternative that if section 5.11 did require them to share, they were only required to do so for one year. The court found that the one year limitation was included in the section so that the market sharing would not result in the unit being taxed as a corporation. *Id.* at 919. *See also* Young, *supra* note 19, at 9-11 to 9-12 (explaining difficulties with express provisions in operating agreements that attempt to affect state and federal taxation).

67. The court asserted its jurisdiction under 28 U.S.C. § 1332(c)(1) (diversity) despite Anschutz' challenge. Anschutz argued: 1) that its principal place of business as well as Amoco's was in Colorado, therefore no diversity existed between them; and 2) Amoco violated the 28 U.S.C. § 1359 prohibition against the collusive manufacture of federal jurisdiction by agreeing with the other WIOs that they would not join the suit against Anschutz so as not to destroy diversity. *Amoco Rocmount*, 7 F.3d at 914.

In rejecting the first jurisdictional challenge, the court explicitly adopted the "total activity" test to determine that Amoco's principal place of business was not Colorado while Anschutz' was. *Id.* at 915-16. The court then determined that a litigation agreement between Amoco and the other WIOs limiting the involvement of the later in the suit against Anschutz did not constitute improper collusion under 28 U.S.C. § 1359. Amoco, as the unit operator, would normally conduct business, including litigation, on behalf of and for the benefit of the WIO's. *Id.* at 916.

68. *Id.* at 918.

69. *Id.* at 919. Under Colorado law, findings of fact must be accepted by the appellate court unless they are clearly erroneous. *Id.* at 918. The Tenth Circuit did admit that ascertaining the parties' intent was a difficult task in this case: "we cannot find clearly erroneous the district court's conclusion that the intent of the parties, *to the extent it can be ascertained at all*, was that they were not required to have a gas purchaser before invoking the market sharing provisions of § 5.11." *Id.* at 919 (emphasis added).

70. *Id.* at 919-20.

judicial decision. In adopting Amoco's interpretation of section 5.11, the district court and the Tenth Circuit managed to ensure an equitable distribution of the gas production proceeds. However, to achieve this end, the district court unconvincingly determined that the section was ambiguous, thereby allowing the court to examine extrinsic evidence regarding the parties' intent.

A court may only investigate the parties' intent through extrinsic evidence if the language of the agreement or provision is ambiguous. To support its conclusion that the section was ambiguous, the Tenth Circuit asserted well-known axioms of contractual interpretation: "[t]he meaning of a contract is found by examination of the entire instrument and not by viewing clauses or phrases in isolation"; "[e]ach word is to be given meaning if at all possible";[71] and "[t]o ascertain whether a provision is ambiguous, the court must examine and construe the language in harmony with the plain, popular, and generally accepted meaning of the words employed and with reference to all provisions of the document."[72] Although the court asserted these propositions, it did not apply them.

a. *The "Ambiguous" Word Defined*

First, the lower court held, and the Tenth Circuit agreed, that the term "excess gas" was ambiguous. The trial court explained that it could mean either the quantity of gas remaining after a purchaser had taken some gas or any quantity of unsold gas.[73] This is a reasonable explanation only if the term is analyzed separately from the provision in which it is found. However, section 5.11 solves the dilemma of the meaning of the term by explicitly defining "excess gas" as a quantity of gas that exceeds the quantity such party's purchaser will take.

b. *Each Word Given Meaning*

The courts' interpretation of section 5.11 rendered the term "gas purchaser" meaningless. The Tenth Circuit pointed out that "[n]owhere else in the contract is a requirement for a gas purchaser mentioned," thereby leaving the court without another reference to the term to examine.[74] It is unlikely that the parties intended to ignore the term. Because "gas purchaser" is mentioned only in section 5.11, the Tenth Circuit *should* have given it import.

c. *Examination of the Entire Instrument*

An examination of the entire instrument shows that the two provisions of the UOA directly preceding section 5.11 are concerned with tak-

71. *Id.* at 917 (quoting United States Fidelity & Guar. Co. v. Budget Rent-A-Car Sys., Inc., 842 P.2d 208, 213 (Colo. 1992) (emphasis in original)).

72. *Id.* (quoting Wota v. Blue Cross & Blue Shield, 831 P.2d 1307, 1309 (Colo. 1992)).

73. *Amoco Rocmount*, No. C86-0172-B at 10.

74. *Amoco Rocmount*, 7 F.3d at 919.

ing in kind.[75] Section 5.9, entitled "Taking in Kind," sets forth a general proposition that "[e]ach party shall currently, as produced, take in kind or separately dispose of its share of Allocable United Substances. . . . Except as otherwise provided in Section 5.10 or 5.11 each Party shall be entitled to receive directly all proceeds from the sale of its share of United Substances sold."[76]

Apparently, section 5.10 acts as the first exception to section 5.9. Section 5.10, entitled "Failure to Take in Kind," contemplates the situation in which a party may "fail to take in kind or separately dispose of its share" of production.[77] Under such circumstances, a party may purchase the share or shares not taken.[78] The second exception to 5.9, the controverted 5.11, contemplates a situation in which a party's gas purchaser will not take all of that party's gas. Under this isolated situation, the parties agreed on balancing in cash.[79] The district court, however, found that the "agreement" rejected balancing in kind and intended to balance in cash.[80] This statement, however, is inaccurate if the document is viewed in its entirety and if any meaning is to be given to the immediately preceding sections. Section 5.9 clearly provides for balancing in kind as the parties' desired remedy for imbalances.[81]

Although the district court used a questionable method in reaching its holding, the Tenth Circuit was not compelled to overturn the ruling because the result was equitable. Under the unit and unit operating agreements, each party contributes to the costs of extracting the production, and therefore should reap rewards in proportion to contribution. The operating agreement embodies the WIOs' commitment to work together toward a common goal of production profit. A "partnership" is formed in which, at a minimum, fair dealing is owed one another. "A sort of team spirit or esprit de corps permeates the operating agreement by the fashion in which the parties put their trust in one another to carry out the

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75. Brief for Appellant, Amoco Rocmount v. Anschutz Corp., No. C86-0172-B (D. Wyo. July 30, 1990) (Appendix: Unit Operating Agreement for the Anschutz Ranch East Unit Area).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. See text accompanying notes 56-58.

81. Arguably, none of these provisions addressed the situation at hand, in which a party was without a gas purchaser and wished to share another WIO's market for gas.

An unattractive effect of the court's decision was to reward Amoco's risky business decision to wait to sell until prices were higher and punish Anschutz for diligently marketing its share of production. In retrospect, Amoco was able to "hold out" at no risk.

Interpreting § 5.11 as the court did also provides incentive for WIOs without purchasers to rely on proceeds from parties with purchasers rather than to secure or attempt to secure purchasers of their own. Parties to the agreement may avoid this result by including a statement requiring all parties to put forth a good faith effort to obtain purchasers, unless such requirement is implicitly imposed upon the parties.

In some jurisdictions, a lessee has an implied duty to diligently search for a market in which to sell produced gas. Tucker v. Hugoton Energy Corp., 855 P.2d 929, 936 (Kan. 1993) (explaining that the payment of shut-in gas royalties does not excuse the lessee from its duty to search for a market). It may be argued that a similar duty is imposed on a WIO.

goals of the agreement."[82] As members of the "joint venture," WIOs reasonably expect to share the fruits of the labor as well as the costs.

B. *Private Agreements Governing Common Law Negligence:* Reese Exploration, Inc. v. Williams Natural Gas Co.[83]

1. Background

Generally, minerals are considered real property and therefore subject to the rules of real estate law. The law governing oil and gas ownership, however, differs substantially from the law governing solid mineral ownership because of the peculiar nature of oil and gas.[84] In the early stages of the development of oil and natural gas law, courts understandably analogized these minerals to wild animals (ferae naturae) because of their migratory propensities and a limited scientific knowledge regarding the nature of the minerals.[85] As a result, the law of capture,[86] which governed ownership of wild animals, was applied to oil and gas.[87]

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82. Milam Randolph Pharo, "Duties and Obligations Revisited — Who Bears What Risk of Loss?," *The Oil and Gas Joint Operating Agreement*, Paper No. 4, 4-2 (Rocky Mtn. Min. L. Fdn. 1990).

83. 983 F.2d 1514 (10th Cir. 1993). During the Survey period, the Tenth Circuit decided several other oil and gas cases: Octagon Gas Sys. v. Rimmer, 995 F.2d 948 (10th Cir. 1993) (holding that the owner of a "perpetual overriding royalty interest" in proceeds from the sale of natural gas through Chapter 11 had an enforceable interest in debtor's gas sale proceeds, that the owner's interest constituted an "account" subject to Article 9 of the UCC, and that the account was an estate property despite prior assignment of the account); Northwest Pipeline Corp. v. FERC, 986 F.2d 1330 (10th Cir. 1993) (holding that a suit brought by a gas pipeline owner to review FERC's order requiring the owner to amend downward a take-or-pay surcharge to customers was not ripe for judicial review); Lone Mountain Production Co. v. Natural Gas Pipeline Co. of Am., 984 F.2d 1551 (10th Cir. 1992) (holding that a pipeline company was estopped from demanding strict compliance with the assignment provision of a gas purchase contract and damages awarded to the well operator were properly based on estimates of preflow production); Howell Petroleum Corp. v. Leben Oil Corp., 976 F.2d 614 (10th Cir. 1992) (holding that a working interest owner's action for accounting was time barred and that the interest holder did not produce the requisite evidence of a balance due as required to obtain an accounting).

84. 1 EUGENE KUNTZ, OIL AND GAS § 2.2 (1987). The law pertaining to oil and gas is generally the same. The gaseous character of natural gas, however, necessitates methods of handling different from those used in oil production. *Id.* § 1.19.

85. Gas, usually present with oil, has the capacity to expand when the pressure within the formation is reduced. Phillip Wm. Lear, "Conservation Principles and Federal Onshore Pooling and Unitization: An Overview," *Federal Onshore Oil and Gas Pooling and Unitization II*, Paper No. 1, 3 (Rocky Mtn. Min. L. Fnd. 1990) (quoting Professor Philip Dufford on the physical characteristics of petroleum).

The rapidity and facility with which the migration of oil takes place depends upon: the hydrostatic pressure, character of the formation, dip of the strata, and nature of the oil. KUNTZ, *supra* note 84, § 1.21.

86. The "law of capture" is used interchangeably with the "rule of capture." It also has been referred to as the "law of piracy" or the "law of the jungle." Robert E. Hardwicke, *The Rule of Capture and its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391, 392 (1935) (deemed as such because it authorizes the taking of another person's property).

87. *See, e.g.*, Bezzi v. Hocker, 370 F.2d 533 (10th Cir. 1966); Anderson v. Beech Aircraft Corp., 699 P.2d 1023 (Kan. 1985); Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. 1934). *Cf.* Ellis v. Arkansas Louisiana Gas Co., 450 F.Supp. 412 (E.D. Okla. 1978), *aff'd*, 609 F.2d 436 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980); White v. New York State Natural Gas Corp., 190 F. Supp. 342 (W.D. Pa. 1960); Lone Star Gas Co. v. Murchison, 353 S.W.2d 870 (Tex. Civ. App. 1962).

The law of capture embodies a simple concept of ownership; whoever captures it owns it, regardless of where it was located.[88] Furthermore, if it escapes it is no longer owned and therefore obtainable by anyone.[89] Although the underlying concept of this rule is simple, many problems resulted from its application to oil and gas. In oil production, the law of capture promotes overdrilling which causes dissipation of reservoir energy and results in substantial waste through nonrecovery.[90] The doctrine was also unsuccessful when applied to natural gas, particularly when gas storage became a necessity.[91]

The primary problems resulting from the application of the law of capture to natural gas centered around determining ownership and liability for damage. Strict adherence to the law of capture meant gas injectors would not retain title to the natural gas that they stored in underground formations, and other parties, such as mineral owners or adjacent land owners, were able to obtain ownership.[92] Furthermore, if the injectors did not retain title to natural gas injected into formations for storage, it was not clear who was liable to the mineral or surface owners for damage caused by the gas.[93]

For an excellent critique on the evolution and application of the rule of capture and the hardships it created for the oil and gas industry see Hardwicke, *supra* note 86. In 1935, when Hardwicke's article was published, all states recognized the rule of capture. *Id.* at 403.

88. Under traditional oil and gas jurisprudence the Rule of Capture determines the owner of the oil and gas. In simple terms the Rule assigns ownership to a party who captures or controls the hydrocarbons by bringing it to the surface, regardless of where the hydrocarbons may have been located underground.

Kramer, *supra* note 7, at 4-6.

89. *See* Mullett v. Bradley, 53 N.Y.S. 781, 782 (N.Y. App. Div. 1898) (noting that the owner loses the property interest in an animal that returns to the wild).

90. Lear, *supra* note 85, at 1-7.

91. The nation's demand for natural gas increased during the past twenty years due to a change in social concerns regarding energy consumption. However, an inefficient gas transport system that provided more gas than needed in the summer months and less than needed in winter months gave rise to the need for an efficient method for storing gas. Fred McGaha, Symposium, *Underground Gas Storage: Opposing Rights and Interest*, 46 LA. L. REV. 871, 871 (1986). The surplus gas is often transported into underground storage reservoirs. *Id.*

92. *Id.* at 879. *Cf.* Octagon Gas Systems v. Rimmer, 995 F.2d 948, 954 (10th Cir. 1993) (once extracted, natural gas becomes personal property in Oklahoma). The inequity of the rule's result is obvious, considering that the gas owner likely paid for the right to extract the gas and for its production or purchased the gas from a producer and then purchased the storage rights.

93. *See* Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. App. 1934) (holding that injected gas becomes ferae naturae and is no longer owned by the injector, therefore the injector is not required to pay a landowner for use of the subsurface strata when the gas strays into it). *Cf.* Ellis v. Arkansas Louisiana Gas Co., 450 F. Supp. 412 (E.D. Okla. 1978), *aff'd*, 609 F.2d 436 (10th Cir. 1979), *cert. denied*, 445 U.S. 964 (1980) (ownership of injected gas is not lost upon injection when it does not mix with native gas and the boundaries of the reservoir are capable of determination); White v. New York State Natural Gas Corp., 190 F. Supp. 342 (E.D. Pa. 1960) (gas storage company could recover from those producing their injected gas from a neighboring well under the theory of conversion upon proving that it was their gas being produced); Lone Star Gas Co. v. Murchison, 353 S.W.2d 870 (Tex. Civ. App. 1962) (ownership of injected gas is not lost).

Problems such as these, resulting from the rule of capture, greatly curtailed the rule's application to oil and gas.[94] Several states have explicitly precluded application of the rule to stored gas.[95] It is now generally accepted that the ownership of gas is not lost upon injection.[96] However, this does not necessarily mean that the injectors will be held responsible for damages caused by storing the gas and its subsequent movement or escape.[97]

2. *Reese Exploration, Inc. v. Williams Natural Gas Co*

In *Reese Exploration, Inc. v. Williams Natural Gas Co.*,[98] the Tenth Circuit looked to the language in the assignment of mineral interests to determine whether a gas owner was liable to an oil producer for damages caused by escaping gas. In doing so, the Court refused to apply Kansas's vestige of the rule of capture.

a. *Facts*

The controversy in *Reese* arose out of a conflict between two oil and gas lease owners in Colony-Welda Field in Anderson County, Kansas. Williams Natural Gas Company (WNG) obtained[99] gas storage rights in the

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94. *See* Lear, *supra* note 85, at 1-8. Waste in oil production due to non-recovery has also been curtailed by the evolution of communitization and unitization as well as secondary and tertiary recovery techniques. *See supra* part I.A.

95. *See* LA. REV. STAT. ANN. § 30:22(D) (1985); OKLA. STAT. ANN., tit. 52, § 36.6 (1992 & Supp. 1994); TEX. NAT. RES. CODE ANN. § 91.182 (West 1993). *See also* BRUCE M. KRAMER & PATRICK H. MARTIN, THE LAW OF POOLING AND UNITIZATION § 2.02 (3d ed. 1989 & Supp. 1992).

96. McGaha, *supra* note 91, at 883 (excepting when the gas can no longer be identified). *Cf.* Anderson v. Beech Aircraft Corp., 699 P.2d 1023 (Kan. 1985) (holding that ownership rights were lost when gas was reinjected, but limiting the holding to situations where natural gas public utilities are not involved, and the injector did not obtain permission from the authorized commission or from the adjoining land owner). Also, parties may still argue that the doctrine, in certain circumstances, applies or should apply to natural gas stored or escaping from the underground reservoirs. *See* Reese v. Williams Natural Gas, 983 F.2d 1514, 1517 (10th Cir. 1993) (petitioner arguing that escaped natural gas was common property under Kansas law).

97. The theory that substances with migrating propensities may be injected into a formation even if the injection results in the displacement of more valuable substances is known as the "negative" rule of capture. According to this theory, the injector will not be liable for damages if pursued as part of a reasonable program of development and without injury to the producing formation. 1 WILLIAMS & MEYERS, OIL AND GAS LAW § 204.5 (1993). *Cf.* Young v. Ethyl Corp., 521 F.2d 771 (8th Cir. 1975), *cert. denied*, 439 U.S. 1089 (1979) (allowing recovery under a theory of nuisance for damages caused by the injection of salt water); Jameson v. Ethyl Corp., 609 S.W.2d 346 (Ark. 1980) (holding injector liable when secondary recovery processes depletes minerals from or causes special damage to adjoining lands).

Note that the "negative rule of capture" is generally not applied to the injection of gas for storage purposes. McGaha, *supra* note 91, at 883-84.

98. *Reese*, 983 F.2d 1514 (10th Cir. 1993).

99. The leases at issue in this case were assigned to W.S. Fees in 1936 and 1937 and entitled Fees to oil, gas, and gas storage rights on the land. Fees conveyed all "the gas and gas rights . . . and all gas storage rights" to Cities Service Gas which was WNG's predecessor in interest. Cities Service Gas began injecting and storing gas in the field in the late 1930's. *Id.* at 1517.

field up to a depth of 1,050 feet.[100] WNG was injecting gas into and withdrawing it from the Bartlesville formation, located at 900 feet in depth.[101]

Reese Exploration Incorporated (Reese) owned the right to produce oil from the same land that WNG was using to store gas.[102] Specifically, Reese was attempting to recover oil from the Squirrel formation located at 800 feet, just above the Bartlesville formation.

Reese alleged that WNG was negligently permitting its injected gas to escape and enter the Squirrel sand formation, thereby inhibiting Reese's oil recovery operations. Reese sought compensatory damages and injunctive relief ordering WNG to lower its storage zone pressure.[103] Reese also argued that the escaped gas was common property under Kansas law.[104] Therefore, Reese requested declaratory relief recognizing its ownership of the migrated gas.[105]

WNG responded that its lease conferred the right to store gas up to 1,050 feet below the surface and that Reese's oil rights were subject to WNG's gas storage rights; therefore, it did not owe Reese a duty.[106]

b. *District Court*

The district court found that WNG's storage rights were limited to the Bartlesville formation.[107] Thus, WNG was liable for the damage caused to Reese by the escaping gas.[108] The court reasoned that the parties had "coexisting rights to produce oil and store gas," neither of which was superior, so neither party should interfere with the other's exercise of its rights

100. *Id.* Fees was both the surface and mineral owner at the time he conveyed gas storage rights to WNG's predecessor. *See* McGaha, *supra* note 91, at 872-73. (discussing which interest owner may lease or assign storage rights).

101. *Reese*, 983 F.2d at 1516.

102. In 1979, Fees' trustee assigned all Fees' remaining rights to Charles Hardesty who assigned them to We-Kan Resources, Inc., who in turn assigned them to Reese. *Id.* at 1517.

103. *Id.* Changing pressures from the storage and escape of gas in and from the Bartlesville formation affected activity in the Squirrel formation because the two formations were in "pressure communication." *Id.* High pressure created by WNG's gas storage inhibited oil production and created safety hazards. Phillip E. DeLaTorre, *Survey of Kansas Oil and Gas Law* (1988-1992), 41 KAN. L. REV. 691, 719 n.203 (1993). WNG's gas rendered nine out of ten of Reese's wells non-producing. *Reese*, 983 F.2d at 1517.

WNG attempted to mitigate the damage loss of gas with a compressor which captured the gas in the Squirrel formation and returned it to the Bartlesville formation. On one occasion, the compressor failed and caused Reese's lead line to "blow out." As a result, twenty acres were soaked with oil and salt water. *Id.*

104. A recent case decided by the Kansas Supreme Court applied the rule of capture to gas storage. *Anderson v. Beech Aircraft Corp.*, 699 P.2d 1023 (Kan. 1985). The *Anderson* court held that an owner of natural gas lost its title when it injected non-native gas into the underground area and the gas was then produced from the common reservoir (limiting the holding to situations where the landowner is not a public utility and has stored natural gas under the property of an adjoining land owner without permission). *Id. See also* Tanya J. Treadway, Note, *Oil & Gas Law: The Rule of Capture Applied to the Underground Storage of Natural Gas* - Anderson v. Beech Aircraft Corp., 34 KAN. L. REV. 801 (1986) (arguing that the *Anderson* court should have based its decision on a theory of trespass rather than quiet title).

105. *Reese*, 983 F.2d at 1517.

106. *Id.*

107. Reese Exploration, Inc. v. Williams Natural Gas Co., 768 F. Supp. 1416, 1425 (D. Kan. 1991).

108. *Id.*

under its respective lease.[109] Furthermore, because WNG had elected to utilize only the Bartlesville formation for storage, it could not now enlarge its storage rights to other formations.[110] However, the court ruled against Reese's claim for ownership finding that although gas had escaped, WNG never lost ownership.[111]

c. *Tenth Circuit Opinion*

The Tenth Circuit affirmed the lower court holding that WNG retained title to the non-native gas produced by Reese from the Squirrel formation,[112] but it reversed the lower court on the negligence issue, holding that WNG was not responsible to Reese for the damage caused by the escaping gas.[113]

In finding that the escaped gas was not subject to the law of capture under Kansas law, the Tenth Circuit distinguished the Kansas' Supreme Court's holding in *Anderson*.[114] According to the court, the situation in *Reese* was easily distinguishable from *Anderson* because: 1) in the present case the gas migrated vertically, whereas in Anderson, the gas migrated horizontally through the same formation to different lands;[115] 2) WNG had a contractual authorization to store gas in the Squirrel formation;[116] and 3) WNG was a natural gas public utility permitted by FERC.[117]

The Tenth Circuit reversed the lower court's holding that WNG was negligent. The court explained that negligence can be found only if a corresponding duty is imposed on the allegedly negligent party. The issue in *Reese* was whether a duty was imposed on WNG in the assignment of its storage rights not to interfere with Reese's oil production.[118] The court resolved this issue by interpreting the express language of the parties' assignment contracts. The grant to WNG's predecessor conveyed the right to store gas in all underground formations above 1,050 feet without any reservations. Meanwhile, the assignment to Reese's predecessor was ex-

109. *Id.* at 1423.

110. *Id.* at 1424. The court analogized WNG's rights to an easement in which a party's actions define the scope and location of the easement. In other words, because WNG had only utilized the Bartlesville formation for storage, its rights to store were now limited to that area. *Id.*

111. *Id.* at 1427.

112. Reese Exploration, Inc. v. Williams Natural Gas Co., 983 F.2d 1514, 1523 (10th Cir. 1993).

113. *Id.* at 1522.

114. *Id.* at 1523. For a description of the *Anderson* holding, see *supra* note 104.

115. The situation in *Reese* was unusual because the two interest owners' tracts were located on top of one another and the gas migrated vertically. Typically, the applicability of the law of capture arises when the parties' tracts are adjacent and the migration is horizontal. The district court reasoned, without sufficient explanation, that the direction of the migration assisted in distinguishing *Reese* from *Anderson*. *Reese*, 768 F. Supp. at 1427. The Tenth Circuit merely adopted the lower court's distinction. *Reese*, 983 F.2d at 1523. *See* DeLaTorre, *supra* note 103, at 720 (criticizing the lower court's distinction of horizontal and vertical movement in determining whether or not to apply the rule because Kansas "recognizes horizontal, as well as vertical, severance of rights").

116. *Reese*, 983 F.2d at 1523.

117. *Id.*

118. *See id.* at 1521.

plicitly made subject to the gas storage rights assigned to WNG.[119] The Tenth Circuit concluded that Reese owed a duty not to interfere with WNG's gas storage activities, but the duty was not reciprocal.[120]

3. Analysis

Several different causes of action may give rise to a capture analysis. Attempts to store gas which migrates to adjoining land owners' property may result in trespass actions by the land owner.[121] If the court adheres to the law of capture, the gas owner is not liable for trespass because the gas owner is deemed to have lost title upon injection or migration.

Rather than sue for damages under trespass, adjoining surface or mineral owners may seek a declaratory judgment that the injector lost possession of or title to the stored gas.[122] Applying the law of capture here would result in a transfer of ownership. Likewise, the gas injector would lose the rights to the gas and the extractor would become the new owner. Finally, gas injected may cause damage to a neighboring interest owner, causing the affected party to sue for negligence.

Reese sued for ownership and negligence. Theoretically, under the law of capture, ownership is either lost upon injection or upon escape from the storage formation; therefore, the previous owner cannot be held liable for damage caused by the gas.[123] For example, if the Tenth Circuit had applied the law of capture in *Reese*, WNG would have been deemed to have lost title to the gas and therefore may not have been liable for damages suffered by Reese. However, Reese would have gained or had the opportunity to gain possession of the gas. On the other hand, without the law of capture, WNG retained ownership, thereby subjecting itself to possible liability for the damage caused by the gas.

A negligence claim against WNG failed because the conveyances of the respective interests designated Reese's interest as servient or subject to WNG's. Therefore, the Tenth Circuit rejected Reese's negligence claim. This demonstrates that contract rights may define duties which control common law negligence. In other words, private agreements, such as leases and assignments of mineral interests, can determine whether common law tort actions apply. Even though Reese suffered damage from the presence of WNG's gas, Reese could find no remedy in court.[124] In creating and purchasing leases and assignments, parties should be aware of such agreements impact on the common law, particularly negligence.

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119. *Id.* at 1521-22.

120. *Id.* at 1522.

121. *See, e.g.*, Hammonds v. Central Kentucky Natural Gas Co., 75 S.W.2d 204 (Ky. 1934).

122. *See, e.g.*, Bezzi v. Hocker, 370 F.2d 533 (10th Cir. 1966).

123. This is not to say that one cannot be negligent in attempting to store or recover the gas.

124. The court noted that WNG's conduct may have been limited by the doctrine of implied covenants or by KAN. STAT. ANN. § 55-1203 (1983), which allows the appropriation of subsurface formations for gas storage, but requires that the appropriation be without prejudice to other rights or interests. The Tenth Circuit, however, did not decide these issues because they were not raised by the parties. *Reese*, 983. F.2d at 1523, n.8.

Although Reese's case engenders sympathy, Reese knew gas was being injected at the location when it took the assignment. Reese's best option now is to enter into a contractual relationship with WNG to remedy or mitigate the situation if it is economically prudent to continue production.[125]

II. PUBLIC LANDS

A. *Public Participation in the Bureau of Land Management's Planning and Land Transfer Procedures:* National Parks and Conservation Ass'n v. Federal Aviation Administration[126]

1. Background

In the Federal Land Policy and Management Act of 1976 (FLPMA),[127] Congress directed the Bureau of Land Management (BLM)[128] to undertake formal, comprehensive planning for the 448 million acres of land within its jurisdiction.[129] Although many of FLPMA's directives are vague and ambiguous,[130] the provisions regarding protec-

125. As a result of the court's ruling, WNG now possesses superior negotiating leverage. Reese would likely have to pay great consideration to convince WNG to alter its conduct.

126. 998 F.2d 1523 (10th Cir. 1993).

127. 43 U.S.C. §§ 1701-1784 (1988). FLPMA covers areas of public land administration that fall beyond the scope of this article. This section will focus on subchapter I of FLPMA (General Provisions) and parts of subchapter II (Land Use Planning and Land Acquisition and Disposition). Subchapter III specifically addresses administration; subchapter IV authorizes the Secretary of Interior to issue permits and leases for domestic livestock grazing; subchapter V provides for the grants of rights-of-way; and subchapter VI discusses reviewing particular tracts for designation as wilderness areas. *See* Robert L. Glicksman, *Severability and the Realignment of the Balance of Power Over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1, 6-7 (1984).

128. The BLM is an agency of the Department of the Interior. For purposes of this article, "public land(s)" refer only to the lands governed by the BLM.

In total, the federal government owns about one-third of the country's on-shore surface land, totaling 730 million out of 2.3 billion acres which comprise the United States. JAN G. LAITOS & JOSEPH P. TOMAIN, ENERGY AND NATURAL RESOURCES LAW 64 (1992). *See also* GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 14 (3d ed. 1993) [hereinafter COGGINS ET. AL] (indicating how much land in each state is owned by the federal government).

129. Prior to FLPMA, the BLM had commenced formal land planning pursuant to the 1964 Classification and Multiple Use Act (CMUA). 43 U.S.C. §§ 1411-1418 (expired 1970).

130. FLPMA is widely criticized for its vagueness and generalities. *See* George Cameron Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. COLO. L. REV. 307, 319 (1990) [hereinafter Coggins] (although § 1712 mandates planning, it otherwise is open-ended; "it specifies neither schedules, procedures, nor content of land use plans, leaving most methods and details to secretarial discretion"); *id.* at 308 ("Congress neglected to spell out anything except vague generalities to guide the BLM"); Lisa J. Hudson, *Judicial Review of Bureau of Land Management's Land Use Plans Under the Federal Rangeland Statutes*, 8 PUB. LAND L. REV. 185, 189 (1987) ("Congress failed to resolve adequately basic management conflicts or translate underlying principles into binding commands" and "failed to ensure that the planning process would be implemented fully and neglected to define precise standards").

In addition to ambiguities within the statute, Coggins attributes BLM's inconsistent planning to budget constraints and other statutes imposing ad hoc planning requirements on the BLM. Coggins, *supra* note 130, at 316-17.

tion for designated areas of critical environmental concern (ACEC)[131] and public participation in the planning process are particularly clear.

Generally, FLPMA embodies the basic philosophies of land use planning, multiple use, and sustained yield.[132] FLPMA grants the agency flexibility in allocating resources rather than forcing the BLM to devote any particular tract of public land to a specific use.[133]

Planning under FLPMA begins with an inventory of all public lands, their resources, and values.[134] FLPMA § 1712(a)[135] commands the BLM to create formal land use plans, based in part on the inventories taken.[136] These plans are legally binding on the BLM,[137] and agency decisions regarding the management of public lands must be "in accordance" with such plans.[138] Therefore, the BLM is theoretically committed to a rational, coordinated management scheme.[139]

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131. An Area of Critical Environmental Concern (ACEC) is an area within the public lands where special management attention is required to "protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards." 43 U.S.C. § 1702(a) (1988). The corresponding regulation uses the same definition of ACEC, except it adds that the identification of a potential ACEC "shall not, of itself, change or prevent change of the management or use of public lands." 43 C.F.R. § 1601.0-5(a) (1993).

ACECs are supposed to be unique areas of national significance deserving protection in their natural state. The ACEC designation is not intended to halt all development. Gail L. Achterman et al., "NFMA and FLPMA: Fifteen Years of Planning," *Public Land Law*, Paper No. 5, 5-27 (Rocky Mtn. Min. L. Fdn. 1992) (citing S. Rep. No. 94-583, 94th Cong., 1st Sess. at 43 (1976)).

132. 43 U.S.C. §§ 1701(a)(7) & 1712(c)(1) (1988). These philosophies, along with much of the language in FLPMA, were borrowed from the 1960 Multiple Use, Sustained-Yield Act (MUSYA). 16 U.S.C. §§ 528-531 (1988). *See* Hudson, *supra* note 130, at 188-89 (explaining that while much of the language in FLPMA was borrowed from the MUSYA applicable to the Forest Service's management of the national forests, the two statutes are different in that the management directives in FLPMA are couched in mandatory language). *See also* COGGINS ET AL., *supra* note 128, at 622-23 (providing a summary of MUSYA).

133. *See generally* Marla E. Mansfield, *On the Cusp of Property Rights: Lessons from Public Land Law*, 18 ECOLOGY L.Q. 43 (1991). See also COGGINS ET AL., supra note 128, at 14 (noting that the basic public land legal conflicts are over use of public resources).

134. *See* 43 U.S.C. § 1711(a) (1988). The section includes identifiable values but does not limit them to outdoor recreation and scenic values. Additionally, the inventory is to be kept current to reflect changes in conditions and to identify new and emerging resource and other values. *Id.*

135. "The Secretary shall, with public involvement . . . develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands." 42 U.S.C. § 1712(a) (1988).

136. *See* 43 U.S.C. § 1712 (c)(4) (1988). The command to plan embodied in the section is unspecific so as to leave room for agency discretion. *See* Coggins, *supra* note 130, at 319. "It is not realistic to expect or require that plans be so specific that they eliminate managerial discretion." On the other hand, under a broad mandate such as this, the agency may "promulgate plans so general as to be meaningless as limitations on or guidelines for subsequent management decisions." *Id.* at 309.

137. *See* Coggins, *supra* note 130, at 309.

138. 43 U.S.C. § 1732(a) (1988).

139. Hudson, *supra* note 130, at 188. Realistically, BLM planning has been hampered by a chronic shortage of resources, personnel, and expertise and by changes in policy direction. Coggins, *supra* note 130, at 318 & n.104. In addition, BLM maintains a low planning budget. *Id.* at 320. As a result, BLM's planning efforts are "criticized as tardy, inconsistent, and generally inadequate." *Id.* at 318.

FLPMA sets forth substantive criteria that the BLM must consider in the development and revision of land use plans.[140] The BLM shall: observe the principles of multiple use and sustained yield; give priority in protection to Areas of Critical Environmental Concern; rely on the inventory of the lands; consider present and potential uses; consider the scarcity of values and the availability of alternatives; weigh the long-term against the short-term benefits; provide for compliance with applicable pollution control laws; and coordinate with other states and other agencies.[141]

In addition to ACECs' role as substantive criteria for the adoption of land use plans,[142] ACECs are mentioned in § 1711(a) of FLPMA, regarding the BLM's land inventories.[143] Section 1711(a) by itself does not change management standards for land designated as an ACEC.[144] Section 1712, however, specifies that the resource inventory required under § 1711(a) including ACEC identification, serves as the foundation for the land use plan.[145] The two sections read together indicate that Congress intended more than cursory consideration of ACECs.[146]

Although FLPMA contains few procedural requirements,[147] it clearly reflects congressional sentiment regarding the importance of including the public in land use decisions. FLPMA was enacted largely in response to a shift in public sentiment regarding public land use from favoring disposition to favoring conservation.[148] Congress recognized the public's growing discontent and resolved to retain the remaining public domain in federal ownership[149] and to manage the lands to avoid "unnecessary or

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140. 43 U.S.C. § 1712(c) (1988).

141. 43 U.S.C. § 1712(c) (1),(3)-(9) (1988). Coggins notes that "[e]ven though Congress phrased each mandatorily, the criteria are remarkable for their lack of specificity." Only the mandates requiring designation and protection of ACECs and compliance with applicable pollution control laws are definite, applicable standards. Coggins, *supra* note 130, at 321.

142. Section 1712(c)(3) provides that in the development and revision of land use plans, "the Secretary shall . . . give priority to the designation and protection of areas of critical environmental concern."

143. Section 1711 (a) provides that "the Secretary shall prepare and maintain . . . an inventory of all public lands . . . giving priority to areas of critical environmental concern."

144. Coggins, *supra* note 130, at 319.

145. *See* 43 U.S.C. § 1712(c)(4) (1988).

146. *See* Coggins, *supra* note 130, at 321-22 (predicting that any challenges to a plan based on the Secretary's statutory requirements to give priority to ACEC designations would "face uphill battles").

147. Coggins points out that FLPMA specifies only two mandatory procedural requirements: public participation and the use of a "systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences." *Id.* at 320 (quoting 43 U.S.C. § 1712 (c)(2) (1988)).

148. Achterman et al., *supra* note 131, at 5-2. FLPMA also sought to remedy wide-spread over-grazing on public lands, among other problems. LAITOS & TOMAIN, *supra* note 128, at 95.

Because FLPMA embodies the multiple use philosophy, the BLM must also consider and fulfill "demands for recreation, minerals, forage, timber, and other resources and activities" in addition to considering conservation interests. Marla E. Mansfield, *The "Public" in Public Land Appeals: A Case Study in "Reformed" Administrative Law and Proposal for Orderly Participation,* 12 HARV. ENVTL. L. REV. 465 (1988) (examining BLM procedural rules to discuss public participation in public land management).

149. 43 U.S.C. § 1701(a)(1) (1988).

undue degradation."[150] ACEC designation and public participation are two tools enabling FLPMA to achieve its objectives.

FLPMA and the BLM's FLPMA regulations embrace the public participation concept.[151] FLPMA provides for public participation twice within § 1712 regarding the development of land use plans. First, "public involvement" is required in developing, maintaining and revising land use plans.[152] Second, FLPMA requires the Secretary to adopt procedures, including public hearings, to act as a vehicle for public participation.[153]

The BLM regulations also contain numerous provisions regarding public participation. The regulations require public involvement in planning at the beginning of the process,[154] throughout a plan's development, and during its adoption, revision, or amendment.[155] Despite the pervasive existence of mandatory public participation provisions in both FLPMA and the regulations, the BLM has attempted to plan without the public.[156]

2. Tenth Circuit Opinion

In *National Parks and Conservation Ass'n v. Federal Aviation Administration*,[157] the Tenth Circuit recognized the public's right to participate in actions affecting public lands. The court held that the BLM neglected to meet its statutorily prescribed duty to provide adequate notice prior to amending a land plan and transferring land within its jurisdiction.[158]

a. *Facts*

The Federal Aviation Administration (FAA) approved and provided funding for construction of an airport in San Juan County, Utah.[159] The

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150. 43 U.S.C. § 1732(b) (1988); 43 C.F.R. § 1601.0-8 (1993).

151. Public involvement is generally defined as "the opportunity for participation by affected citizens in rulemaking, decisionmaking, and planning with respect to the public lands, including public meetings or hearings at locations near the affected lands, or advisory mechanisms, or other such procedures as may be required in particular instances. 43 U.S.C. § 1702(d) (1988).

152. 43 U.S.C. § 1712(a) (1988).

153. 43 U.S.C. § 1712(f) (1988):

> The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

154. 43 C.F.R. §§ 1610.2 (c), (f)(1); 1610.4-1 (1993).

155. *See* 43 C.F.R. §§ 1610.2 (a), (c), (f)(2-5); 1610.5-5 (1993) (requiring participation in amending a plan); *Id.* § 1610.4-2 (in reviewing the proposed planning criteria); *Id.* § 1610.5-1(b) (in publication of the proposed resource management plan and proposed and final environmental impact statement (EIS) and in any significant change made to the plan as a result of action on protest).

156. *See* Coggins, *supra* note 130, at 320 & n.119 (citing National Wildlife Fed'n v. Burford, 835 F.2d 305 (D.C.Cir. 1987), *rev'd*, 878 F.2d 422 (D.C. Cir. 1989), *cert. granted sub nom.*, Lujan v. National Wildlife Fed'n, 110 S. Ct. 834 (1990); Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985)).

157. 998 F.2d 1523 (10th Cir. 1993).

158. *Id.* at 1531.

159. *Id.* at 1526.

site FAA selected encompassed public land administered by the BLM[160] pursuant to FLPMA.[161] The BLM had designated a portion of the land as an ACEC by a 1989 Proposed Resource Management Plan (RMP).[162] The proposed RMP provided ACEC protection for corridors on both sides of Utah Highway U-276, which subsequently included the airport site.[163] The RMP also contained a ban on the transfer of federal ownership of the land.[164]

In order to convey the tract, the BLM had to amend the RMP, which according to the court, required compliance with the National Environmental Policy Act of 1969 (NEPA).[165] The FAA issued a draft environmental impact statement (DEIS) on January 17, 1990 in which the final airport site was identified for the first time. This was also the first form of notice to the public indicating that the BLM was transferring the land rather than moving forward with the proposed RMP.[166] Although the BLM and the FAA had been discussing the transfer for some time prior to the issuance of the DEIS, the public believed that the BLM intended to protect the area.[167] The National Parks & Conservation Association (NPCA) requested a stay of the construction and sought review of the BLM's decision to amend the land plan to convey public land to the FAA for construction of the airport. Specifically, NPCA argued that the BLM violated FLPMA by failing to give notice of the land plan amendment and by not providing a rational assessment of the effect of the conveyance on the existing land plans. Furthermore, NPCA alleged that the BLM's rever-

160. *Id.* at 1525.

161. 43 U.S.C. §§ 1701 to 1784 (1988).

162. *See generally* 43 C.F.R. §§ 1610.1 - 1610.8 (1993). A Resource Management Plan is a land use plan as described by FLPMA. 43 C.F.R. § 1601.0-5(k) (1993). It should establish: land areas for exclusive or limited use (including ACEC designation); allowable resource uses and levels of production to be maintained; resource condition goals; program constraints and necessary management practices; areas to be covered by more specific plans; support action; implementation sequences; and standards for monitoring and evaluating the plan. *See* 43 C.F.R. § 1601.0-5 (k)(1)-(8); *National Parks*, 998 F.2d at 1525 n.7.

The BLM also governed the site according to the 1973 Management Framework Plan (MFP). *Id.* at 1525. MFPs differ in both procedure and content from RMPs prepared under FLPMA. Coggins, *supra* note 130, at 317. A MFP provides step-by-step instructions as to the management of a particular public land resource area. Each individual management decision is listed along with the action required to achieve the decision and the supporting rationale. *National Parks*, 998 F.2d at 1525-26 n.8. The MFPs remain in force until superseded by RMPs, but the BLM has been slow to make the transition and to promulgate RMPs. *See* Coggins, *supra* note 130, at 317 & n.93.

163. *National Parks*, 998 F.2d at 1525-26.

164. *Id.* at 1529.

165. 42 U.S.C. §§ 4321 to 4370a (1988). NEPA requires an EIS for all "major Federal actions significantly affecting the quality of the human environment." *Id.* § 4332(C) (1988).

An EIS enables federal administrators to consider the consequences of their actions before acting. In an EIS, adequate consideration must be given to reasonable alternatives to the proposed action. The statute, however, does not impose an obligation on the agency to follow any course of action. EISs have been controversial due to the additional transaction costs incurred in developing them and the litigation they have spurred. *See* COGGINS ET AL., *supra* note 128, at 335.

166. *National Parks*, 998 F.2d at 1530-31.

167. 998 F.2d at 1530. In fact, in April 1989, the BLM reissued the proposed RMP with the ACEC designation and ban on transfer still included. *Id.*

sal of its position with respect to the Scenic Corridor ACEC was arbitrary and capricious.[168]

The BLM[169] responded that the EIS conducted by the FAA sufficiently met the BLM's requirements under FLPMA and that because the 1989 RMP was only a proposal, the change in designation of land was not an arbitrary and capricious action.[170]

3. Holding

The Tenth Circuit denied NPCA's request for a stay of the construction of the airport,[171] but the court held that the BLM violated the specific requirements of NEPA and FLPMA. The BLM failed to provide the public with notice of its actions so that public participation could take place.[172] Based on the chronology of events leading to the transfer of BLM land, it was apparent to the court that the notice given was "far from adequate."[173] Specifically, the BLM violated its own regulation that notice be provided at the "outset of the planning process."[174] The court reversed and remanded because it was unclear whether the BLM would have reached the same decision if public involvement had been present from the beginning of the process.[175]

4. Analysis

In *National Parks*, the Tenth Circuit applied the brakes to the BLM's fast and loose rulemaking by holding that the BLM's public notice of the plan amendment and land transfer was inadequate. Given the complexity of the BLM's job in developing plans for vast amounts of land and its tight budget, the joint effort between the BLM and the FAA in providing a DEIS was reasonable.[176] The BLM's reliance on other agencies to provide notice of its own actions, however, was not acceptable.

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168. *Id.* at 1526. The NPCA also sought review of the FAA's determination that the noise impact of the airport would have "no significant impact" on the adjacent Glen Canyon National Recreation Area. The NPCA specifically alleged that the FAA ignored relevant studies on noise impact and failed to consider relevant factors in determining noise impacts. *Id.*

The court agreed, concluding that the FAA's approval of the airport project, based on a finding of "no significant impact," was arbitrary and capricious. It explained that the decision to reverse and remand FAA's finding of no significant impact would not be meaningless even though the airport had already been built. On remand, the FAA may determine that it must make use of studies not utilized in the EIS. If the agency then finds a "significant impact," it would be required to mitigate the damage. *Id.* at 1533-34.

169. Other respondents included the FAA, the Department of Transportation, and the Department of the Interior. *Id.* at 1523.

170. *Id.* at 1526.

171. *Id.* at 1525 n.3.

172. *Id.* at 1531.

173. *Id.*

174. 43 C.F.R. § 1610.4-1 (1993).

175. *National Parks*, 998 F.2d at 1533. The court remanded to determine whether the land should be retained under BLM control and management or transferred to the FAA. *Id.*

176. The court did not address whether the BLM was required to furnish its own EIS for amending the plan. Agencies may be exempt from NEPA obligations when there is a direct statutory conflict with the agency's enabling legislation, if the agency action pursuant to an environmental statute is the functional equivalent of NEPA review, or if the agency's statutory duties further NEPA's purposes. LAITOS & TOMAIN, *supra* note 128, at 242-43.

Public participation is obviously thwarted by inadequate notice. FLPMA clearly announces Congress' intent that the public stay abreast of the BLM's planning activities. Similar sentiment was reflected in the BLM's own regulations. Due to the pervasiveness of concern for public involvement embodied in the statute, it is unlikely the courts will overlook omissions by the BLM in this area.

Although the Tenth Circuit prevented the BLM from disregarding FLPMA mandates by supporting an important procedural aspect of the statute, the court failed to give FLPMA substantive meaning regarding ACECs.[177] As noted earlier in this survey, many of FLPMA's substantive provisions are vague.[178] The provision regarding ACEC designation, however, is not. Congress intended that ACEC designation attach if the land is nationally significant and deserving of protection in its natural condition. It is unlikely that Congress intended ACEC designation to be disregarded by the BLM upon receiving an offer to purchase. Judicial enforcement of ACECs and other substantive FLPMA provisions would give the BLM incentive to provide coherent and consistent land plans. The Tenth Circuit had the opportunity in *National Parks,* but failed to give import to the BLM's ACEC designation.

Furthermore, the Tenth Circuit unwisely denied NPCA's request for a stay of the construction of the airport, which was completed prior to the issuance of this decision.[179] Although the court held that the BLM did not follow FLPMA's procedural mandates regarding public involvement, the holding merely provided a post hoc reprimand of the BLM's conduct. Because public involvement is an essential procedural element of FLPMA, an injunction would not have been an unreasonable remedy.[180]

In actions alleging NEPA violations, courts may grant plaintiffs preliminary injunctions against projects in their early stages.[181] Under such circumstances, the agency generally is required to remedy procedural deficiencies by either preparing an EIS or correcting an inadequate one before resuming work on the project.[182] Similarly, the court could have halted construction of the airport to allow the BLM to correct its omission and comply with the statute.

The court explained that even though the airport had been built, the remand was not meaningless because mitigation measures could still be

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The BLM attempted to eschew NEPA in early planning efforts. *See* National Resources Defense Council v. Morton, 388 F. Supp. 829, 841-42 (D. D.C. 1974), *aff'd per curiam,* 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied,* 427 U.S. 913 (1976) (rejecting the BLM's argument that a programmatic environmental impact statement would suffice to assess all BLM grazing programs and ordering the agency to prepare 145 district-specific EISs by 1988).

177. Courts have historically avoided substantive FLPMA review. *See* Coggins, *supra* note 130, at 326.

178. *See supra* part III.A.

179. *National Parks,* 998 F.2d at 1525 n.3.

180. The court noted the seriousness of the BLM's failure to notify the public when it pointed out that the agency may not have made the same decision to convey the land to the FAA "if active public involvement [were] present from the beginning of the process." *Id.* at 1533.

181. *See* Steubing v. Brinegar, 511 F.2d 489, 495-96 (2d Cir. 1975).

182. JAN G. LAITOS, NATURAL RESOURCES LAW 112 (1985).

implemented. Regardless of public sentiment regarding the use of the land, this provides little consolation for the court's disregard of the public's statutory right to participate in the BLM's use designation of the "public" land.

CONCLUSION

A substantial number of oil and gas cases are resolved by judicial interpretation of the underlying agreements. In *Amoco*, the Tenth Circuit interpreted a gas marketing clause in a unit operating agreement to allow the working interest owners to share the proceeds of gas sales. In *Reese*, the Tenth Circuit found that the underlying assignments controlled the parties respective duties and held the owner of escaping gas was not liable for damage it caused. Together, *Amoco* and *Reese* demonstrate an inconsistency in the court's degree of judicial activism in interpreting private oil and gas agreements. Finally, in the area of public lands, in *National Parks*, the Tenth Circuit ruled in favor of public participation in the BLM's planning process. Although the court could have prevented the BLM from conveying public land without public involvement by granting an injunction, the *National Parks* decision nonetheless, sent a powerful message to the agency regarding the importance of public participation.

Cristyn Eddy